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COURT OF CRIMINAL APPEALS
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In the Court of Criminal Appeals of Texas

Peter Anthony Traylor,
Appellant

v.

The State of Texas,
Appellee

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COURT OF CRIMINAL APPEALS
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No. PD-0967-17

On Discretionary Review from the 13th Court of Appeals in No. 13-13-00371-CR, on Appeal from Cause Number 366-82774-2010 in the 366th District Court of Collin County, Texas, the Honorable Ray Wheless, Judge Presiding.

State's Brief on Discretionary Review

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The State Requests Oral Argument

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To the Honorable Court of Criminal Appeals:

Statement of the Case

Appellant was charged by indictment with first-degree burglary of a habitation with intent to commit aggravated assault. CR 19. His first trial ended in a mistrial after the jury was unable to reach a verdict. 5 Supp.RR 8. At his second trial, Appellant pleaded not guilty before a jury and was convicted. CR 251; 3 RR 6; 5 RR 6. The trial court assessed punishment at twenty years' confinement in the Texas Department of Criminal Justice. CR 254; 6 RR 187.

On appeal, Appellant's first counsel filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967) accompanied by a motion to withdraw. The court of appeals found that there were arguable appellate issues as to speedy trial and ineffective assistance of counsel, granted the motion to withdraw, and abated the case to the trial court for appointment of new counsel. *Traylor v. State*, No. 13-13-00371-CR (Tex. App.—Corpus Christi-Edinburg Apr. 28, 2013, no pet.) (not designated for publication).

Appellant's new counsel filed a brief claiming a speedy trial violation and a double jeopardy violation. The court of appeals reversed the

conviction in a published opinion, holding that Appellant was acquitted of the charged offense based upon jury notes from the first trial, and remanding the case for trial on the lesser-included offense of second-degree burglary. *Traylor v. State*, No. 13-13-00371-CR, slip op. at 21, 24, 2017 WL 2289026 (Tex. App.—Corpus Christi-Edinburg May 25, 2017) (withdrawn).

The State timely filed a motion for rehearing. The court of appeals denied the State's motion for rehearing, withdrew its original opinion, and issued a new published opinion, holding that Appellant was acquitted of the charged burglary offense at his first trial, but reforming the conviction to the lesser-included offense of second-degree burglary and remanding the case for a new punishment hearing. *Traylor v. State*, No. 13-13-00371-CR, -- S.W.3d --, 2017 WL 3306357 (Tex. App.—Corpus Christi-Edinburg Aug. 3, 2017, pet granted) (not yet reported).

The State timely filed a Petition for Discretionary Review, which was granted by this Court on December 13, 2017.

Statement Regarding Oral Argument

This Court stated that oral argument was permitted in its order granting discretionary review. The State believes oral argument will assist the Court in resolving the issues before the Court.

Issues Presented

1. Has the court of appeals misapplied *Blueford v. Arkansas* by holding that two jury notes indicating the jury deadlocked on a lesser-included offense amount to an informal verdict of acquittal on the charged offense?
2. Do mere jury notes regarding a deadlock on a lesser-charge contain sufficient indicia to show the jury manifestly intended an informal verdict of acquittal?
3. Did *Blueford v. Arkansas* overrule this Court's precedent that a jury's report of its progress towards a verdict does not amount to an informal verdict of acquittal?

Statement of Facts

Stacey Fail and his girlfriend Alicia Carter were getting ready to go to bed just before midnight on July 9, 2010. 3 RR 18-19, 163. Fail was in the kitchen, getting water, while Carter was putting away her laptop. 3 RR 20, 163. As she stood up, she suddenly saw a figure all in black break through the glass in the backdoor. 3 RR 163-64. The intruder had a black ball cap pulled low over his face, and he held a hatchet in his hands. 3 RR 164. Carter started screaming and fighting with the intruder, struggling for the hatchet. 3 RR 21, 25, 166-70. She was cut on her wrist and chest during the struggle. 3 RR 29, 80, 99, 147, 167, 170. Fail shouted for his teenaged daughter upstairs to call 911 and ran to help Carter, hitting at the intruder with a piece of glass from the broken door. 3 RR 21, 28, 85-86. The intruder pinned Carter with the hatchet held up to her throat and said that he would kill them if the police came. 3 RR 28, 169-71. As Carter continued struggling with the intruder, she was able to see his face and shouted, "It's [Appellant]!" 3 RR 29, 172.

Appellant was Carter's son-in-law, and he was going through a divorce from her daughter at the time of the offense. 3 RR 155-56, 161-

62. Carter's daughter and her two daughters previously lived with Carter and Fail, but they had moved out several months earlier. 3 RR 160-61. When Carter identified him, Appellant told them that he just wanted to know where his children were. 3 RR 32-33, 173-74. They talked for approximately ten minutes, and Appellant seemed to calm down. 3 RR 32-34, 37, 174. Then the police knocked at the front door, and Appellant ran out through the broken back door. 3 RR 38, 96-97, 145, 177.

Carter was taken to the hospital, where she received stitches for the cuts on her wrist and chest. 3 RR 102, 178-80. She still had scars and numbness in her wrist by the time of trial. 3 RR 170. The police searched for Appellant and found a broken segment of fence where a person could have slipped out of the backyard. 3 RR 107, 146. They set up a perimeter around the neighborhood, but they were unable to locate Appellant that night. 3 RR 101-102. Based on Carter's and Fail's identification, the police obtained an arrest warrant for Appellant. 3 RR 213. He was ultimately arrested in November in Michigan. 4 RR 13. He was interviewed by the police but neither confessed nor denied committing the offense. 4 RR 22; SX 1A.

Summary of the State's Argument

This Court's precedent in *Hawthorn* dictates that the jury's notes in this case were not verdicts of acquittal. Texas courts have consistently followed *Hawthorn* until now. The Supreme Court's opinion in *Blueford* is consistent with *Hawthorn*. Attempting to discern a verdict from jury notes is fraught with peril because they offer only limited insight into the non-final workings of a group of mainly non-lawyers. Moreover, *Barrios* held that Texas law does not require jurors to acquit an accused of a greater offense before considering a lesser-included offense. The jury instructions in this case also did not require such. Thus, Appellant's case is even weaker than that rejected in *Blueford*. Even the *Blueford* dissenters would reject Appellant's claim.

Argument

The controlling factor of Appellant's case is whether a jury note in the first trial should be considered as an informal verdict of acquittal on the charged offense or a mere report on the jury's progress towards a verdict. If the first, then Appellant could only be retried on the lesser-included offense of second-degree burglary, as the appellate court concluded. But if the second, then there was no double jeopardy violation in retrying Appellant for the charged offense and his conviction should be upheld.

The court of appeals relied entirely on a 2012 Supreme Court decision, *Blueford v. Arkansas*, to reach the first conclusion. But in doing so, it applied an overbroad reading of *Blueford* in order to find it overruled controlling case law from this Court. This holding rendered courts across the state uncertain as to the final legal meaning of a jury note, a previously well-established legal precedent.

This Court's precedent dictates that jury notes are not verdicts

Nearly forty years ago, this Court laid down guidance for the courts of this state to consider when evaluating a jury note regarding their

progress toward a verdict, a common occurrence every day in Texas's criminal courts. In *State ex rel. Hawthorn v. Giblin*, the jury sent a note that "they had voted 12-0 on Attempted Murder but were hung 6 to 6 on Aggravated Assault." *State ex rel. Hawthorn v. Giblin,* 589 S.W.2d 431, 432 (Tex. Crim. App. [Panel Op.] 1979). The trial court dismissed the jury without any further deliberations. *Id.* The *Hawthorn* Court was faced with determining whether "written communications from the jury" on their progress could be considered a verdict. *Id.* Its decision was based on two factors. First, it held that a jury has not decided the issue until "it declares the accused guilty of one of the offenses or not guilty of all of them," precluding an acquittal on the greater charge and a hung jury on a lesser-included offense. *Id.* at 432-33. But it also determined that the jury notes "were written in answer to questions from the trial court as to the status of the jury's deliberations." *Id.* at 433. These jury notes "were intended merely as reports on the jury's progress toward a verdict," not a verdict in itself. *Id.* at 433. Thus, even though the jury reported it had unanimously decided against the charged offense, its decision was not final and was not manifestly intended to operate as an acquittal. *Id.*

Texas courts of appeals, including the Thirteenth Court of Appeals, have followed the *Hawthorn* rule

Similar issues are faced by Texas criminal courts on a regular basis. Jury notes are common. Jury notes indicating deadlock are common. Indeed, there are entire lines of case law dedicated to determining when these notes should be taken seriously and a mistrial declared versus when the jury should be encouraged to continue deliberating in hopes of still reaching a verdict despite their claims of deadlock. On the specific question of whether a jury's note that it is unanimous against a charged offense but still deadlocked on a lesser offense should be considered a final verdict of acquittal, this Court's decision in *Hawthorn* provided a clear rule consistent with both state and federal law. And this decision has been applied by numerous lower courts across the state. *See, e.g.*:

- *Ex parte Cantu,* 120 S.W.3d 519, 521 (Tex. App.—Corpus Christi-Edinburg 2003, no pet.);
- *Cardona v. State,* 957 S.W.2d 675, 677 (Tex. App.—Waco 1997, no pet.);
- *Hooker v. State,* No. 01-06-00767-CR, 2008 WL 384179, at *5-6 (Tex. App.—Houston [1st Dist.] Feb. 14, 2008, no pet.) (not designated for publication);
- *Noble v. State,* No. 05-02-01734-CR, 2004 WL 112940, at *2 (Tex. App.—Dallas Jan. 26, 2004, no pet.) (not designated for publication); *and*
- *Clark v. State,* No. 14-98-00425-CR, 1998 WL 820836, at *2-3 (Tex. App.—Houston [14th Dist.] Nov. 25, 1998, pet. ref'd) (not designated for publication).

The Thirteenth Court alone has departed from this precedent, holding that *Hawthorn* was overruled by a later Supreme Court decision, *Blueford v. Arkansas. Traylor,* 2017 WL 3306357, at *8-10. In *Blueford*, the jury reported to the trial court that it was "hopelessly deadlocked" on the lesser-included offense of manslaughter but had unanimously decided against the charged offense of murder. *Blueford v. Arkansas,* 566 U.S. 599, 603-604 (2012). The jury was allowed to continue deliberating for an additional half-hour before a mistrial was declared. *Id.* The Supreme Court concluded that the jury's report did not amount to an informal acquittal because "[t]he foreperson's report was not a final resolution of anything." *Id.* at 2050. Because the jury continued deliberating and could have reconsidered this decision, the "report of the foreperson" lacked the "finality necessary to constitute an acquittal." *Id.*

Blueford **dictates that Appellant was not acquitted of first-degree burglary at his first trial and supports the** ***Hawthorn*** **rule**

The decision in *Blueford* supported, rather than overruled, the reasoning in *Hawthorn*. As *Hawthorn* concluded that the jury notes

were "reports on the jury's progress" rather than an informal verdict, so *Blueford* held that the "report of the foreperson" did not have the finality of a verdict. *Compare Hawthorn,* 589 S.W.2d at 433, *with Blueford,* 566 U.S. at 604-605. Indeed, the only variance between the two cases is the first of the two decisions reached by *Hawthorn*—whether a jury *could* reach a final decision as to only a portion of the case. *Hawthorn* concluded it could not under any circumstances; *Blueford* concluded that there may be situations in which it could. This was the focus of the Thirteenth Court's rationale for concluding *Hawthorn* had been overruled—that "a jury's post-deliberation communication may, in an appropriate case, contain the finality necessary to amount to an acquittal for double jeopardy purposes." *Traylor,* 2017 WL 3306357, at *8-10. But while *Blueford* indicated such a result was a theoretical possibility, it did not provide any guidance for the circumstances in which a "report of the foreperson" could attain sufficient finality. Rather, it simply explained the multiple ways in which the jury report in that case was not adequate. Thus, the holding upon which the Thirteenth Court relied is mere dicta and does not support overturning decades of *Hawthorn* precedent.

Further, both *Blueford* and *Hawthorn* agreed on the crucial second issue—that a jury's informal report of its progress does not contain sufficient reliability to amount to an informal verdict of acquittal. *Blueford* specifically concluded that "[t]he foreperson's report was not a final resolution of anything." *Blueford,* 566 U.S, at 604-605. Similarly, in *Hawthorn*, this Court held that the jury notes "were intended merely as reports on the jury's progress toward a verdict." *Hawthorn,* 589 S.W.2d at 433. Regardless of whether a jury *can* render a partial verdict, both this Court and the Supreme Court have agreed that a simple jury note regarding deadlock is not sufficient to do so. Thus, nothing in *Blueford* overrules this Court's sound precedent.

Indeed, the instant case demonstrates precisely why a mere jury note is not sufficiently final to amount to a verdict. The only time the jury indicated it was unanimous for an acquittal of the charged offense was on the first day of deliberations, stating that the vote was "12 Not Guilty" for the charged offense, "5 Guilty" for the lesser offense, and "7 Not Guilty." CR 218. After that report, the jury continued deliberating for another hour, recessed overnight, and deliberated an additional two-and-a-half hours in the morning. 4 Supp.RR 51, 70, 72; 5 Supp.RR 4. In

the second note, the foreperson only stated that there were two jurors each for "guilty" and "not guilty" who would not change their positions and the overall split was "8 not guilty" and "4 guilty." CR 219. When questioned by the trial court, the foreperson only stated that they were "deadlocked" or "at an impasse." 5 Supp.RR 7. Notably, the foreperson never indicated in the second deadlock note or when questioned by the trial court that the jury was still unanimous on the acquittal verdict for the charged offense or that the split in votes applied to any particular charge. This is nearly identical to the foreperson's report in *Blueford* that the jury was still unable to reach a verdict without reiterating any of its prior verdicts.

This case demonstrates the peril of attempting to discern a final verdict when the jury is merely reporting its progress to the judge. There is none of the formality of a jury's final verdict. The jury was not polled or given any indication that the foreperson's report would be given any more significance than merely reporting deadlock. Indeed, the jury was twice told in the court's charge that its verdict must be in writing and signed by the presiding juror. CR 209, 210. To accept their progress report as a verdict without warning that it would be

considered as a final decision fails to comply with the instructions given to the jury regarding their role in the case.

Zavala shows why jury notes should not be treated as verdicts

A previous similar case also demonstrates why the interim progress reports cannot be considered final. In *Zavala*, the foreperson reported a unanimous acquittal on the charged offense but a deadlock on the lesser. *Ex parte Zavala*, 900 S.W.2d 867, 869 (Tex. App.—Corpus Christi-Edinburg 1995, no pet.). But at a subsequent habeas hearing, two jurors testified that the acquittal vote was only as part of an agreement to convict on the lesser charge that other jurors later reneged on, and the jury was thus not unanimous on the acquittal as a final verdict. *Id.* If the jury in either case had known that the foreperson's status report was going to be considered an acquittal, they could have spoken up at trial rather than all simply agreeing that they were deadlocked.

Jury notes lack the solemnity and finality of a verdict

In a jury note, the jury is simply reporting its progress to the trial court and seeking guidance for what it should do next—an informal

communication rather than a verdict. Indeed, here, the jury's first report that it was deadlocked came not even from a formal written communication to the court but a telephone call to the bailiff. 4 RR 64-65. A juror would have no way of knowing that these informal tallies and communications to the trial court would be considered a final verdict. That is precisely why the Texas statute governing informal verdicts requires that a jury be given the opportunity to reduce an informal verdict to writing before the trial court may conclude that it manifestly intended to acquit. Tex. Code Crim. Proc. art. 37.10(a). The Court gave an excellent example in *Blueford:*

> A jury enters the jury room, having just been given these instructions. The foreperson decides that it would make sense to determine the extent of the jurors' agreement before discussions begin. Accordingly, she conducts a vote on capital murder, and everyone votes against guilt. She does the same for first-degree murder, and again, everyone votes against guilt. She then calls for a vote on manslaughter, and there is disagreement. Only then do the jurors engage in a discussion about the circumstances of the crime. While considering the arguments of the other jurors on how the death was caused, one of the jurors starts rethinking his own stance on a greater offense. After reflecting on the evidence, he comes to believe that the defendant did knowingly cause the death—satisfying the definition of first-degree murder. At that point, nothing in the instructions prohibits the jury from doing what juries often do: revisit a prior vote. "The very object of the jury system," after all, "is to secure

> unanimity by a comparison of views, and by arguments among the jurors themselves." A single juror's change of mind is all it takes to require the jury to reconsider a greater offense.
>
> *Blueford*, 566 U.S. at 607 (citation omitted).

This Court's precedent dictates that juries are allowed to consider all possible offenses at the same time rather than forced to acquit an accused prior to considering a lesser-included offense

Moreover, the type of acquittal rendered by the Thirteenth Court in this case is inconsistent with this Court's precedent on the manner in which a jury deliberates multiple offenses, as in this case. In *Barrios v. State*, the Court held that juries are not required to acquit an accused of a greater offense before deliberating and returning a verdict on a lesser-included offense. *Barrios v. State*, 283 S.W.3d 348, 352-53 (Tex. Crim. App. 2009). The jury charge in *Barrios* contained a transition instruction between the charged offense and a lesser-included offense:

> Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of capital murder and next consider whether the defendant is guilty of robbery.
>
> *Id.* at 349.

The Court held that, despite language that seemed to require an acquittal prior to consideration of a lesser-included offense, that such

was *not* required under Texas law. *Id.* at 352-53. The Court suggested better transition language for jury charges—substitution of the language "or if you are unable to agree, you will next consider" for "you will acquit and next consider." *Id.* at 353.

Both of the jury charges in this case used the *Barrios* transition. CR: 207 (first jury charge); CR: 246 (second jury charge). Appellant's verdict form in each case gave the jury the options of a guilty verdict on first-degree burglary, a guilty verdict on second-degree burglary, or not guilty. CR: 211 (first charge); CR: 251 (second charge). Each charge also gave the jury a special issue whether Appellant used or exhibited a deadly weapon. CR: 212 (first charge); CR: 252 (second charge). The jury did not answer the special issue in the first trial, and the jury made an affirmative finding of a deadly weapon in the second trial. CR: 212; CR: 252.

The jury charge in *Blueford*, by comparison, contained transition instructions that only referenced whether the jury had a reasonable doubt as to an offense before proceeding to lesser-included offense. *Blueford*, 566 U.S. at 602. The verdict form gave the jury the options of guilty to the indicted charge, guilty of one of two lesser-included

offenses, or a verdict of not guilty. *Id.* at 603. But the *Blueford* instructions did not tell the jury they could not go back and reconsider a higher charge. *Id.* at 607. Thus, even though the *Blueford* Court *assumed* that the jury had unanimously voted not-guilty on the higher charges, that did not equate to an acquittal because the jury could go back and reconsider an earlier vote. *Id.*

By comparison, the jury charge in this case explicitly instructed the jury that they could consider lesser-included offenses if they merely disagreed—no acquittal was required. CR: 207. Thus, Appellant's claim that he was acquitted at his first trial is even weaker than that rejected in *Blueford*.

The dissent in *Blueford* also demonstrates that an acquittal is not required in this case. Justice Sotomayor described Arkansas as a "hard transition" state requiring that juries acquit an accused of a greater offense before considering a lesser-included offense as a matter of state law. *Id.* at 612-13. Justice Sotomayor's dissent relied in part on a survey of various states' laws in *People v. Richardson*, 184 P.2d 755, 764 & n.7 (Colo. 2008).

The Colorado Supreme Court in *Richardson* overruled a claim that an accused was implicitly acquitted of several charges based upon post-trial juror questionnaires. *Id.* at 762. Richardson claimed he was entitled to a "partial verdict inquiry," that is, a determination whether the jury acquitted him of a greater offense during what otherwise appeared to be unsuccessful deliberations. The Colorado Supreme Court noted that a majority of states had rejected such claims. *Id.* at 763. A minority of states, however, do inquire whether a jury may have acquitted an accused of some charges even though they did not return a formal verdict. *Id.* In rejecting a claim similar to Appellant's, the *Richardson* court described these minority states as "hard transition" states—the jury is instructed that they must acquit first before considering a lesser charge. *Id.* at 764 & n.7. This Court, of course, has already determined that Texas is not a "hard transition" state. *Barrios*, 283 S.W.3d at 352-53. Thus, it is likely even the three dissenters in *Blueford* would find that Appellant was not acquitted of anything at his first trial.

Conclusion

Hawthorn took a situation fraught with peril and reduced it to a clear rule that was easy for both appellate and trial courts to apply in the future. *Blueford* did not directly address *Hawthorn* or the Texas rule, but its language is consistent with longstanding Texas policy. The Thirteenth Court's decision in the instant case is an unwarranted extension of *Blueford* and improperly overturns this Court's sound precedent in *Hawthorn*. This Court should uphold *Hawthorn* and reverse the decision below.

Prayer

The State prays that the judgment of the court of appeals be reversed and the judgment of the trial court be affirmed.

Respectfully submitted,

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Certificate of Service

A copy of the State's brief has been sent by electronic service to counsel for Appellant, Marc Fratter, at mfratter@yahoo.com, and to the State Prosecuting Attorney, Stacey Soule, at Stacey Soule Stacey.Soule@SPA.texas.gov on this, the 29th day of January, 2018.

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Certificate of Compliance

This brief complies with the word limitations in Texas Rule of Appellate Procedure 9.4(i)(2). In reliance on the word count of the computer program used to prepare this brief, the undersigned attorney certifies that this brief contains 3,905 words, exclusive of the sections of the brief exempted by Rule 9.4(i)(1).

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